SUPREME COURT, U.S.
DEC 24
MICHAEL RODAK, JR.

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-981

JOSH ELLIOTT and ROBERT D. ELLIOTT,
Petitioners,

vs.

CHRYSLER MOTORS CORPORATION, WALTER EPPRECHT, WALTER EPPRECHT'S DODGE CORPORATION, JOHN DOE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Petitioners, Josh Elliott and Robert D. Elliott, respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of the State of Nevada rendered in this proceedings on September 26, 1973.

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of Nevada appear in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada was rendered on September 26, 1973, and this petition for certiorari is filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the equal protection clause of the Fourteenth Amendment of the United States Constitution guarantees to a Black person an opportunity to seek employment and to enter a business on the same terms as are available to white persons.

2. Whether the State Courts of Nevada did not err in failing to make their forums available to the Plaintiffs to prosecute their lawsuit in support of their constitutional rights.

3. Whether a Black person has a justiciable cause of action to protect his employment or business rights under the Civil Rights statutes.

STATEMENT OF THE CASE

Petitioners brought an action in the Eighth Judicial District Court of the State of Nevada seeking injunctive relief and monetary damages. They asserted that they had an agreement with the Defendant Chrysler Motors Corporation that if they would go out and obtain financial backing and learn the automobile vending business they would be given the opportunity to apply for the first available franchise in the Las Vegas vicinity. They asserted

further that in reliance upon Chrysler's promise they had gathered together a group of persons and found employment with a Chrysler dealership, had learned the business, had gathered the finances and had notified Chrysler of their availability for the franchise. That Chrysler, instead, offered the franchise to the Defendant Walt Epprecht Dodge and a combine of persons associated with him without giving the Black Plaintiffs any opportunity to apply or vie for the said franchise. They asserted further that Chrysler had an agreement with the United States Government and the Office of Minority Business Enterprise to give Negroes opportunities to enter the mainstream of commerce and to qualify for franchises, and that Chrysler has a monopoly of the franchising business for Chrysler, Plymouth, Dodge, Imperial and other subsidiaries of Chrysler, and that it was a restraint of trade to deny Plaintiffs the opportunity to engage therein in accordance with the oral agreement had between the parties. The lower court dismissed the Complaint, denied the preliminary injunction, and the appeal to the Nevada Supreme Court resulted only in a Per Curiam opinion by the Nevada Supreme Court, which is set forth in the Appendix hereto, affirming the lower court's dismissal of the action. The Nevada Supreme Court did not discuss the merits of any of the four causes of action, especially did not consider the verified Complaint charging violation of Plaintiffs' civil rights.

REASONS FOR GRANTING THE WRIT

I.

The State Courts must be encouraged to make available to litigants on civil rights their forums. Persons who have causes of action arising out of civil rights should be given the equal protection of the law, and due process of law, to bring their causes of action in the State Courts, even if they might have the Federal Court as a proper forum.

II.

The Black citizens of the United States who reside in Nevada have no opportunity to enter any branch of commerce. All of these opportunities are reserved for the white population. Chrysler and other large automobile manufacturers and distributors are all engaged in interstate commerce and they all award franchises to persons at their own whim, without any criteria for making any such franchises available to Black persons. The State laws do not envision, or provide for the equal protection of Blacks, and there is no way that Blacks will ever be able to be given equal opportunities in employment, commerce or industry unless the civil rights laws are put into operation by the States.

It is, therefore, essential that the United States Supreme Court give guidance to the State Courts since all of these questions are similarly raised in all the 50 States of the United States and its Territories. The writ of certiorari should, therefore, issue from the United States Supreme Court in order that this question be resolved and that guidance be given to the Courts of the various States to the end that the constitutional rights of minorities may get greater consideration and adjudication from the States.

III.

The decision below decides that Black persons aggrieved in the State of Nevada have no right to complain and their complaints state no justiciable cause of action.

IV.

There is no need to comply with any statute of frauds except in the specific instances set forth in the law. Moreover, the statute of frauds is an affirmative defense which should be pleaded. Further, even if the statute of frauds did exist, the fact that the Plaintiffs performed all the conditions set forth by the Defendant Chrysler on their part to be performed would take the matter out of the statute of frauds. All of these are questions of fact to be resolved in a trial of the issues and not on a motion to dismiss. The terse manner in which the lower court and the Supreme Court treated the constitutional rights of the Plaintiffs is indicative of the manner in which the courts of this State look upon the Black residents and their civil rights. They are more largely disregarded and breached than recognized and honored. The United States Supreme Court should speak on the subject and give guidance to the courts of the State of Nevada.

CONCLUSION

The time honored procedures of complaint, answer, reply and adjudication on the merits should be available to Blacks, even as it is available to whites in the State of Nevada.

Respectfully submitted,

CHARLES L. KELLAR
623 Carson Avenue
Las Vegas, Nevada 89101
Attorney for Petitioners

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEVADA RULES OF CIVIL PROCEDURE 8 (c) provides:

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

The Complaint provided:

CASE No. A-105436

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

JOSH ELLIOTT, ROBERT D. ELLIOTT, and LEONARD T. MASON,

Plaintiffs,

-vs-

CHRYSLER MOTORS CORPORATION, JERRY KUSKE, F. G. HAZELROTH, R. B. McCURRY, JR., R. K. BROWN, C. A. CAFIERO, WALTER EPPRECHT, WALTER EPPRECHT'S DODGE CORP., JOHN DOE I, II, III and IV, and LYNN TOWNSEND,

Defendants.

COMPLAINT

For a First Cause of Action

The Plaintiffs, by their attorney, Charles L. Kellar, for a complaint against the Defendants, show the Court the following:

I.

The Plaintiffs are all Black citizens of the United States residing in the State of Nevada who desire to enter into the mainstream of commerce and industry, and business in the United States and to procure a franchise for the operation, sale and servicing of new cars manufactured, made and distributed by Defendant CHRYSLER MOTORS CORPORATION.

II.

That the said Defendant, Chrysler Motors Corporation, has a monopoly of the manufacture, sale and distribution of Chrysler, Plymouth, Dodge and related automobiles, parts and products. That the Chrysler Corporation and the other named Defendants are officers, agents, associates or functionaries of the said corporation and its subsidiaries and related industrial organizations.

III.

That the said Defendant, Chrysler, has advertised and publicized its alleged desire to aid Blacks to enter the mainstream of commerce and industry in the United States, and that the said Plaintiffs acting and relying upon that information and representation by the said Defendant, contacted, consulted and agreed with the said Defendants, its agents, servants and employees that the said Defendant would give Blacks the first available franchise for a Chrysler or related dealership in Las Vegas, Nevada, and the opportunity to apply and qualify for the next available Chrysler agency and franchise to be issued in Clark County.

IV.

That in reliance upon that promise and the representations of the Defendants, the Plaintiffs spent considerable sums and have arranged to procure financial backing, expertise and other necessary services and facilities to apply for and obtain the next Chrysler agency franchise which the Defendants promised would be made available to the Plaintiffs.

V.

That the Defendants knew that the Plaintiffs relied upon the said representations, and would act thereupon,

. . . and the said Defendants induced the Plaintiffs so to rely. . . . . Instead of carrying out these understandings among the parties, however, Defendants of the Chrysler Corporation, their agents and functionaries have now agreed and entered upon a contract to issue to Defendant WALTER EPPRECHT, owner and operator of Walt Epprecht's Dodge-Chrysler franchise in Clark County, another Chrysler franchise and agency for new cars, without ever having made the same available to Plaintiffs, or without honoring the agreement among the Plaintiffs and Defendants.

VI.

That the said arrangement with the Defendant WALTER EPPRECHT and WALTER EPPRECHT'S DODGE CORP. is a violation of the agreements and understandings existing among the other named Defendants and the Plaintiffs herein, and will forever prevent them from obtaining a Chrysler franchise, and that the said agreements are in violation of their economic rights, interest and property.

VII.

That the Plaintiffs have no adequate remedy at law and no way of measuring their damages, and that the only way their rights, interest and contractual relations with the Defendants can be protected is by the issuance by the Court of a preliminary and permanent injunction which are sought herein which will prevent the Defendant Chrysler Corp. from consummating the franchise with Defendants Walter Epprecht and Walter Epprecht's Dodge Corp. and any others acting in concert or associated with the said Defendants.

VIII.

That it has been necessary to engage the services of Charles L. Kellar, an attorney and counsellor at law, herein and the reasonable value of his services are sought herein as an item of damages.

WHEREFORE, the Plaintiffs demand of the Defendants on this cause of action:

A preliminary and permanent injunction enjoining the Defendants from issuing any franchise, consummating any contract to issue a franchise to anyone but the Plaintiffs pending the hearing and determination of the issues herein, together with costs and attorney's fees.

For a Second Cause of Action

I.

The Plaintiffs reallege the Complaint in full with the same force as if set forth at this point at length and assert in addition:

II.

That the Defendants have entered into a conspiracy to deprive the Plaintiffs of the agreement heretofore referred to herein, and that the same is a violation of their civil and constitutional rights as set out in 42 USC 1981-1985, and that damages are sought herein against the Defendants in such sums in excess of $10,000.00 as to the Court or the triers of the fact shall seem just and equitable in the premises, together with costs and attorney's fees.

For a Third Cause of Action

I.

The Plaintiffs reallege the Complaint heretofore alleged herein and assert in addition:

II.

The acts of the Defendants are fraudulent and a malicious invasion of the Plaintiffs' economic rights and interests, and that the laws of the State of Nevada permit punitive damages for such fraudulent and malicious conduct, and that punitive and exemplary damages, together with an award of counsel fees, are sought in this cause of action to such extent in excess of $10,000.00 as the triers of the fact shall find just and equitable.

For a Fourth Cause of Action

I.

The Plaintiffs reallege the Complaint heretofore set forth herein with the same force as if set forth at this point at length and state in addition:

II.

That pursuant to the declaratory judgment statutes of the State of Nevada, NRS 30.030 et seq., Plaintiffs request that the Court adjudicate and declare the following:

1. That the Plaintiffs had an agreement with the Defendant Chrysler Motors Corporation, its agents, servants and employees to inform the Plaintiffs and give them the opportunity to apply and vie for and qualify for the next Chrysler franchise to be issued in Clark County, Nevada.

2. That the Plaintiffs relied upon these representations and made plans, and expended monies in pursuance thereof and with the expectation that the Defendants would carry out their agreements with the Plaintiffs.

3. That the Defendants have entered upon arrangements and agreements to issue a new franchise in Clark County, Nevada, without apprising the Plaintiffs thereof,

or giving them any opportunity to bid thereupon, or to acquire the said franchise.

4. That this behavior constitutes an invasion of the property rights of the Plaintiffs and a violation of the contractual agreements among the Plaintiffs, the Chrysler Corp., its agents, servants and employees.

5. That the Plaintiffs will be done irreparable harm, incapable of financial estimate, unless the Court enjoins the said Defendants from issuing the new franchise to Defendant Walter Epprecht and/or Defendant Walt Epprecht Dodge, or any of their associates or functionaries.

6. That the acts of the Defendants in arranging with Walter Epprecht, his associates and others for the issuance of a new franchise in Clark County, Nevada, is a violation of the agreements with the Plaintiffs and is a conspiracy to deprive the Plaintiffs of their civil rights and the opportunity to engage in and enter the mainstream of American business and commerce in the new car sales and service field, is an overt and malicious act for which the Plaintiffs should be awarded punitive and compensatory damages.

7. That the Plaintiffs are entitled to legal fees to compensate their counsel, and for other just and reasonable expenses in connection with this litigation.

WHEREFORE, Plaintiffs pray for a declaratory judgment, for preliminary and permanent injunction, for punitive damages, for compensatory damages, and such other, different and further relief as to the Court may seem just in the premises.

/s/ Charles L. Kellar
Attorney for Plaintiffs
1042 West Owens Avenue
Las Vegas, Nevada 89106

STATE OF NEVADA)
) SS.:
COUNTY OF CLARK)

LEONARD T. MASON, being first duly sworn, deposes and says:

That he is one of the Plaintiffs in the above entitled action; that he has read the above and foregoing Complaint, knows the contents thereof, and that the same is true of his own knowledge, except for those matters therein stated on information and belief, and as for those matters he believes them to be true.

/s/ Leonard T. Mason

Subscribed and sworn to before me this 18th day of September, 1972.

/s/ Cornelia Kellar
Notary Public
State of Nevada, Clark County

My Commission Expires May 28, 1973.

Defendants made a motion to dismiss the Complaint. Plaintiffs noticed the taking of the depositions of Gary Hanna, Walter Epprecht. Defendants procured orders vacating the said depositions.

CASE No. A-105436

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

JOSH ELLIOTT, ROBERT D. ELLIOTT, and LEONARD T. MASON,

Plaintiffs,

-vs-

CHRYSLER MOTORS CORPORATION, JERRY KUSKE, F. G. HAZELROTH, R. B. McCURRY, JR., R. K. BROWN, E. A. CAFIERO, WALTER EPPRECHT, WALTER EPPRECHT'S DODGE CORP., JOHN DOE I, II, III and IV, and LYNN TOWNSEND,

Defendants.

MOTION TO DISMISS

Defendant, CHRYSLER MOTORS CORPORATION, respectfully moves this Honorable Court as a supplement to this defendant's motion filed October 4, 1972, to dismiss plaintiff's Complaint in its entirety on the grounds that the Complaint fails to state a claim upon which relief can be granted.

This motion is made and based upon N.R.C.P. Rule 12 (b) (5) and all of the pleadings and files herein.

Lionel Sawyer Collins & Wartman
By: /s/ Robert M. Buckalew
302 E. Carson Ave., Suite 800
Las Vegas, Nevada 89101
Attorneys for Defendant, Chrysler Motors Corporation

CASE No. A-105436

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

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CHRYSLER MOTORS CORPORATION, JERRY KUSKE, F. G. HAZELROTH, R. B. McCURRY, JR., R. K. BROWN, C. A. CAFIERO, WALTER EPPRECHT, WALTER EPPRECHT'S DODGE CORP., JOHN DOE I, II, III and IV, and LYNN TOWNSEND,

Defendants.

SUMMARY JUDGMENT

This cause having come on to be heard on the 2nd day of November, 1972, Plaintiffs appearing in person and by and through their counsel, CHARLES L. KELLAR, Esquire, Defendant, WALTER EPPRECHT, Individually and as President for and on behalf of LAS VEGAS DODGE, INC. appearing in person and by and through his counsel, A. LORING PRIMEAUX, Esquire and GEORGE M. DICKERSON, Esquire of DICKERSON, MILES & PICO, and Defendant, CHRYSLER MOTORS CORPORATION, appearing by and through its counsel, HIRA D. ANDERSON, JR., Esquire, in association with ROBERT M. BUCKALEW, Esquire, of LIONEL SAWYER COLLINS & WARTMAN, and the Court having before it the Motion for Preliminary Injunction filed by Plaintiffs on the 19th day of September, 1972, a Motion to Dismiss filed on the 27th day of September, 1972, by Defendant, Walter Epprecht,

Individually and as President for and on behalf of Las Vegas Dodge, Inc. under Rule 12 (b) (5) Nevada Rules of Civil Procedure, a Motion to Dismiss filed on the 4th day of October, 1972 by Chrysler Motors Corporation under Rule 12 (b) (5) Nevada Rules of Civil Procedure, a Supplemental Motion to Dismiss filed on the 18th day of October, 1972 by Defendant, Chrysler Motors Corporation under Rule 12 (b) (5) Nevada Rules of Civil Procedure and addressed to all causes of action alleged in Plaintiffs' Complaint, and a Supplemental Motion to Dismiss filed on the 26th day of October, 1972 by the Defendant, Walter Epprecht, Individually and as President for and on behalf of Las Vegas Dodge, Inc. under Rule 12 (b) (5) Nevada Rules of Civil Procedure and addressed to all causes of action alleged in Plaintiffs' Complaint, and the Court further having before it the AFfidavits accompanying Plaintiffs' verified Complaint filed September 19, 1972 and supplemented by Affidavit filed in Open Court by Plaintiffs on the 2nd day of November, 1972, and the Court being presented by Plaintiff matters outside the pleadings including matters asserted by the Plaintiffs in their Memorandum of Points and Authorities in Support of Plaintiffs' application for Preliminary Injunction filed on the 3rd day of October, 1972, and the AFfidavits in support of Plaintiffs' claims for relief heretofore referred to, and the Court pursuant to Rule 12 (b) (5) Nevada Rules of Civil Procedure having considered the same and not excluding any of the same, Defendants having jointly requested that the Court treat the matters pending as for summary judgment under Rule 56 Nevada Rules of Civil Procedure, and the Court thereafter having requested of all parties if any desired to present any further material pertinent to the motions pending and all parties responding in the negative; and

The Court having considered the pleadings, affidavits and exhibits of record and the parties having filed memoranda of points and authorities in support of and in opposition to said motions, and after hearing oral arguments by counsel for the respective parties in Open Court and the Court being fully advised in the premises and having determined that there is no genuine issue of material fact and as a matter of law Defendants, and each of them, are entitled to summary judgment in their favor, and the Court having on the 13th day of November, 1972, rendered its decision in Open Court to such effect, and good cause appearing therefor;

IT IS ORDERED, ADJUDGED AND DECREED that the motions of Defendant, Walter Epprecht, Individually and Walter Epprecht as President for and on behalf of Las Vegas Dodge, Inc., and of Defendant Chrysler Motors Corporation under Rule 12 (b) (5) Nevada Rules of Civil Procedure being treated by the Court as required by Rule 12 (b) (5) Nevada Rules of Civil Procedure as Defendants' Motions for Summary Judgment under Rule 56 Nevada Rules of Civil Procedure as to first cause of action, second cause of action, third cause of action and fourth cause of action alleged in Plaintiffs' Complaint filed on the 19th day of September, 1972, be, and summary judgment is hereby granted in favor of Defendants, Walter Epprecht, Individually, Las Vegas Dodge, Inc. and Chrysler Motors Corporation and against Plaintiffs as to each of said causes of action individually and to said Complaint and the whole thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Complaint, and each of said first cause of action, second cause of action, third cause of action and fourth cause of action therein alleged, and the whole thereof, as to Defendants Walter Epprecht, Individually,

Las Vegas Dodge, Inc. and Chrysler Motors Corporation be, and the same hereby are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for Preliminary Injunction be, and the same is hereby dismissed as moot.

DATED and DONE in Open Court this 14th day of November, 1972.

/s/ James D. Santini
District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 7148

JOSH ELLIOTT, ROBERT D. ELLIOTT, and LEONARD T. MASON
Appellants,

-vs-

CHRYSLER MOTORS CORPORATION, WALTER EPPRECHT, individually and as President of LAS VEGAS DODGE, INC.,
Respondents.

Appeal from summary judgment for defendants; Eighth Judicial District Court, Clark County; James D. Santini, Judge.

Affirmed.

Charles L. Kellar, of Las Vegas, for Appellants.

Lionel Sawyer Collins & Wartman, and Robert M. Buckalew, of Las Vegas for Respondent Chrysler Motors Corporation.

Dickerson, Miles & Pico, and A. Loring Primeaux, of Las Vegas, for Respondents Walter Epprecht and Las Vegas Dodge, Inc.

OPINION

PER CURIAM:

This is an appeal from a summary judgment for the defendants in a suit for injunctive relief and damages. The plaintiffs assert an oral agreement for an automobile franchise with Chrysler Motors Corporation which, according to the plaintiffs' understanding, was not to be performed within one year from the making thereof. Assuming the existence of such an oral agreement, the failure to comply with the statute of frauds would void it as to the defendant Chrysler Motors Corporation. NRS 111.220 (1); Stanley v. Levy & Zentner Co., 60 Nev. 432, 112 P. 2d 1047 (1941); Nehls v. Stock Farming Co., 43 Nev. 253, 184 P. 212, 185 P. 563 (1919); cf. Harmon v. Tanner Motor Tours, 79 Nev. 4, 377 P. 2d 622 (1963). Moreover, since the claims for relief asserted by the plaintiffs against the defendants Epprecht and Las Vegas Dodge, Inc., presuppose an enforceable agreement between the plaintiffs and Chrysler Motors Corporation, they must fail as well.

Affirmed.

/s/ Thompson, C. J.
/s/ Mowbray
/s/ Gunderson
/s/ Batjer
/s/ Zenoff

Attest: A full, true and Correct Copy.
C. R. Davenport, Clerk of the Supreme Court
By: /s/ Judith McCulloch, Deputy.

JUDGMENT OF NEVADA SUPREME COURT

PER CURIAM:

Appeal from Judgment

This matter having been heretofore submitted and the Court being fully advised in the premises and the law, it is now

ORDERED, ADJUDGED AND DECREED to the effect: "Affirmed".

Opinion of the Court PER CURIAM.

IN WITNESS WHEREOF I have hereunder set my hand and affixed the seal of the said Supreme Court at my office in Carson City, Nevada, this 26th day of September, 1973.

/s/ C. R. Davenport,
Clerk of the Supreme Court
of the State of Nevada.

Judgment as quoted above entered this 26th day of September, 1973.

/s/ James D. Santini
(C. R. Davenport, 16th day
of October, 1973.)